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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

(2)

No. 84-1495

RALPH KEMP, WARDEN
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Petitioner,

v.

CURFEW DAVIS,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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16 pp

QUESTIONS PRESENTED

I.

The Circuit Court Below Properly Determined the Jury Composition Issue.

II.

The Petitioner Warden Prevailed on the "Sandstrom v. Montana" Issue in the Circuit Court Below and Therefore Cannot Expect Duplicatous Relief From this Court on This Issue.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RALPH KEMP, Warden,	*	
Petitioner	*	
	*	No. 84-1495
v.	*	
CURFEW DAVIS,	*	
Respondent	*	

STATEMENT OF THE CASE[1]

(i) Procedural History

Curfew Davis was convicted of murder and sentenced to death by the Superior Court of Troup County, Georgia on November 12, 1974. The Supreme Court of Georgia affirmed the conviction and sentence. Davis v. State, 236 Ga. 804, 225 S.E. 2d 241 (1976). On Writ of Certiorari, this Court vacated Davis' sentence of death. Davis v. Georgia, 429 U.S. 122 (1976).

Curfew Davis was retried on the issue of sentencing only and again sentenced to death by the Superior Court of Troup County. The Supreme Court of Georgia affirmed the sentence of death. Davis v. State, 241 Ga. 376, 247 S.E.2d 45 (1978), cert. denied, 439 U.S. 947 (1978).

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1. References to the Record in the District Court below will be designated "R" followed by the appropriate page number. References to the transcript of Davis' first trial where the guilt/innocence issue was determined will be designated "T 1st Trial" followed by the appropriate page number. References to the transcript of Davis' second trial where sentencing was determined will be designated "T 2nd Trial" followed by the appropriate volume and page number. References to Davis' state habeas corpus hearing will be designated "T State Hab" followed by the appropriate page number.

Davis then filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia. The Petition was denied on July 16, 1981. An application for certificate of probable cause to appeal was denied by the Supreme Court of Georgia on September 8, 1981.

On July 26, 1982, Davis filed a Petition for Writ of Habeas Corpus in the United States District Court (R-3). The District Court denied the Petition, without allowing the requested evidentiary hearing, on November 19, 1982 (R-204).

Davis filed a timely notice of appeal and application for certificate of probable cause to authorize appeal (R-222, 224) which was granted by the District Court (R-226).

On December 27, 1983, a panel of the United States Court of Appeals [Fay and Kravitch, Circuit Judges, and Atkins (United States District Judge, Southern District of Florida, sitting by designation)] reversed the judgment of the district court, remanding the case with instructions to the district court to grant the writ of habeas corpus as to Petitioner's sentence only. On March 6, 1984, the Eleventh Circuit granted rehearing en banc. The Eleventh Circuit, sitting en banc, entered an order affirming the panel decision on the jury composition issue but denying Curfew Davis relief on the Sandstrom v. Montana issue.

(ii) Statement of Facts

Curfew Davis was convicted of the murder of Ann Starnes. Ms. Starnes disappeared on July 19, 1974 (T 1st Trial at 46). On July 30, 1974, Curfew Davis was arrested after being seen in Ms. Starnes automobile some ten (10) days after her disappearance. (T 1st Trial at 50-55).

At the first police interrogation of Curfew Davis on July 30, 1974 (Id. at 55), he refused to sign a waiver of his right to

silence and his right to counsel (Id. at 57; T 2nd Trial Vol. 5 at 95-96). After counsel was appointed, that counsel gave police permission to interrogate Curfew Davis, without counsel being present! (T 1st Trial at 58, 70, 73; T 2nd Trial, Vol. 5 at 113, 116, 117-118).

From July 30, 1974 to late August, 1974, Davis was interrogated daily by police officers without the benefit of counsel. On some occasions, Davis would invoke his right to silence and refuse to talk; when he did so, the police would ignore it and simply return at a later time to resume questioning. (T 1st Trial at 57, 59, 61, 62, 70; T 2nd Trial, Vol. 5 at 99).

At the interrogation of August 28, 1974, one month after his arrest, Davis made the most damaging statements and led police to the location of the victim's body (T 1st Trial at 70-72).

An autopsy of the skeletal remains of the victim revealed that the cause of death was a single gunshot wound to the head. The victim's head had also suffered a severe blow. (T 2nd Trial, Vol. 14 at 109-115).

Pursuant to a warrantless search of the room where Davis resided, police seized the revolver which was used to kill Ms. Starnes. (T 1st Trial at 130).

Davis has admitted involvement, with others in concealing Ms. Starnes' body and the theft of her car; he has testified that he did not kill Ms. Starnes nor did he intend for her to be killed. (T 2nd Trial Vol. 15 at 81-103). The State's evidence, consisting almost completely of evidence derived from Davis' statements does not contradict this testimony.

REASONS WHY THE PETITION FOR WRIT OF CERTIOARI SHOULD NOT BE GRANTED

I. THE CIRCUIT COURT BELOW PROPERLY DETERMINED THE JURY COMPOSITION ISSUE

The traverse jury which sentenced Curfew Davis to death was composed in violation of the Sixth and Fourteenth Amendments to the United States Constitution. An analysis of the composition of the traverse jury pool from which this jury was drawn reveals both elements of a prima facie showing of an unlawfully drawn jury: 1) substantial underrepresentation of "cognizable" groups; and 2) a method of jury selection susceptible to possible abuse. See Casteneda v. Partida, 430 U.S. 482, 494-495 (1977).

(A) Substantial Underrepresentation of Cognizable Groups

The uncontroverted evidence introduced at the trial court proved the following information concerning the statistical breakdown of the traverse jury pool from which Davis' sentencing trial jury was chosen (the 1975 Traverse Jury Pool):

	Men	Women	White Persons	Black Persons
% of Eligible Population	47.1%	52.9%	68.2%	31.8%
% in Jury Pool	65.5%	34.5%	86.3%	13.7%
Disparity	+18.4%	-18.4%	+18.1%	-18.1%

(T 2nd Trial Vol. 4 at 54-55, 64, 155)

Davis also proved the following information concerning the previous traverse jury pool in Troup County (the 1973 Traverse Jury Pool):[2]

2. Davis also sought to introduce evidence of the 1971 Troup County Traverse Jury Pool. Prior to the motion hearings in the trial court, Davis had subpoenaed the 1971, 1973 and 1975 Traverse Jury Pool lists. The 1973 and 1975 lists were provided to Davis' counsel and the names on those lists were then identified by race and sex. The Clerk of Court in Troup County initially indicated that the 1971 list was no longer available (T 2nd Trial Vol. 5 at 51-52, 56-57).

[Footnote 2 continued on next page]

	Men	Women	White Persons	Black Persons
% of Eligible Population	47.1%	52.9%	68.2%	31.8%
% in Jury Pool	65.5%	40.3%	86.3%	13.7%
Disparity	+12.6%	-12.6%	+18.1%	-18.1%

(T 2nd Trial Vol. 4 at 54-55, 64, 155).

Davis further offered to prove that the Grand Jury Pool in Troup County was composed of 85.1% men and 95.5% white persons, only 14.19% women and only 4.5% black persons![3] (T 2nd Trial Vol. 5 at 64-66).

It is clear that both black persons, Strauder v. West Virginia, 100 U.S. 303 (1879), and women, Taylor v. Louisiana, 419 U.S. 522 (1975) constitute cognizable classes. Although

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[Footnote 2, continued]

On the day that the pre-trial motion hearing began, Curfew Davis' counsel was advised by the Clerk, for the first time, that the 1971 Traverse Jury Pool list was available. Counsel requested that the trial court leave the record open for a period of only 48 hours, so that the names on the 1971 list could also be identified by race and sex. The trial court arbitrarily refused to hold the record open for this brief period of time. (T 2nd Trial Vol. 5 at 51-55, 56-58, 64). All lists prior to 1971 had been destroyed by the Clerk's office. (T 2nd Trial Vol. 5 at 51, 56).

3. At the hearing on Davis' challenge to the composition of the traverse jury, the trial court would not allow any evidence concerning the composition of the grand jury pools in Troup County (T 2nd Trial, Vol. 4 at 73-74). Davis was only allowed to make an offer of proof of what this evidence would show. (T 2nd Trial Vol. 5 at 64-65).

Davis properly sought to introduce grand jury pool evidence as further proof of a history of discrimination in the composition of jury pools in Troup County and as further evidence of the intent to discriminate on the part of the jury commissioners, who were responsible for compiling both the grand and traverse jury pools. (T 2nd Trial Vol. 4 at 73-74; Vol. 5 at 64-65). This evidence was excluded by the trial court on the erroneous basis that it was irrelevant to a traverse jury challenge. (T 2nd Trial Vol. 4 at 73-74).

Curfew Davis is a member of the underrepresented group of black persons, he clearly need not have been a member of either of the underrepresented classes to assert the unconstitutionality of their exclusion. Peters v. Kiff, 407 U.S. 493 (1972); Taylor v. Louisiana, 419 U.S. at 526.

The statistical disparities which Petitioner has shown (an 18.1% absolute underrepresentation of black persons, 18.4% absolute underrepresentation of women)[4], are within the range of disparities found significant in other cases. See, e.g., Alexander v. Louisiana, 405 U.S. 625 (1972); Hernandez v. Texas, 347 U.S. 475 (1954).

(B) Method of Jury Selection Susceptible to Possible Abuse

The jury commissioners of Troup County selected the jury pools from a source list of registered voters. Georgia law requires that the jury pool be composed of a fairly representative cross-section of the community even if, in order to obtain a fair cross-section, the jury commissioners have to supplement the voter registration list with names obtained from other sources. Ga. Code Ann. §59-106 (OCGA §15-12-40).

The evidence clearly demonstrates that the jurors were not selected at random.

Jury Commissioner Julian Jones at first testified that he simply chose every sixth name on his precinct voter registration list for inclusion in the 1975 traverse jury pool. He then

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4. The underrepresentation of these groups determined by comparative disparity is even greater. Calculating comparative disparity, black persons are underrepresented by 83.4%, and women are underrepresented by 73.8%. (T 2nd Trial Vol. 4 at 53-57).

admitted that he selected an astounding 700 of the 4015 persons on the 1975 traverse jury pool by simply choosing persons that he thought would make good jurors. (T 2nd Trial Vol. 5 at 8-9).

Jury Commissioner Lavinia Morgan initially testified that she chose every sixth name on her precinct voter registration list for inclusion in the 1975 traverse jury pool. When it was pointed out to Ms. Morgan that at one point she had checked four names in a row on her list, at another point had checked five names in a row on her list, at another point skipped sixteen names in a row, she conceded that she in fact was not using a random method of selection. (T 2nd Trial Vol. 5 at pp. 34-35).

The jury commissioners conceded in testimony that the method of drawing every sixth name[5] provided only 2800 names; the commissioners then went back over the list to produce the 3500 names required by the court.[6] Inexplicably, they ended up with a list of 4015 names. No jury commissioner could adequately describe the selection process used in selecting the second group of over 1200 names.

> If a disparity [in the representation of a cognizable group in the jury pool] is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class related factors entered into the selection process.

Casteneda v. Partida, supra, 430 U.S. at 494, n.13.

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5. The District Court below noted that 2 of the 6 jury commissioners admitted using a nonrandom method of jury selection (R-212). If 1/3 of a jury pool was selected by nonrandom means, the jury pool was not randomly chosen.

6. See the testimony of Jury Commissioner Julian Jones. T. 2nd Trial Vol. 5.

(C) The State's Failure to Rebut the Prima Facie Case

Davis, having established a prima facie case of unlawful jury composition, the burden shifted to the State to prove that no discriminatory intent existed in the jury selection process. Beginning with Norris v. Alabama, 294 U.S. 587 (1935), this Court has repeatedly held that statements by the state officials involved in the jury selection process of their good faith and lack of discriminatory intent in making their decisions is not a sufficient rebuttal case.[7] E.g., Turner v. Fouche, 396 U.S. 346, at 361 (1970): "[t]he testimony of the jury commissioners and the superior court judge that they included or excluded no one because of race did not suffice to overcome the appellants'

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7. The state trial court would not allow Davis' counsel to question the jury commissioners or present evidence concerning the history and practice of race and sex discrimination in Troup County, or acts of race and sex discrimination by the public officials (especially the jury commissioners of Troup County). See, e.g., T 2nd Trial Vol. 4 at 75, 76, 78-79, 80, 81, 84, 111-112, 128; Vol. 5 at 16, 17, 18, 19, 30-31, 36, 41, 48.

   Davis' counsel at his second trial was not even allowed to ask the individual jury commissioners the simple question, "Are you racially biased?" (T. 2nd Trial Vol. 4 at 81).

   In Rogers v. Lodge, 458 U.S. 613 (1982), this Court, in the context of a voting rights case, upheld a District Court's use of evidence of a pattern of racial discrimination in a community as proof of the public officials' intent to discriminate. "Thus determining the existence of a discriminatory purpose demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Rogers v. Lodge, supra, 458 U.S. at 617.

   Among the evidence which this Court found probative of an intent to discriminate was: past discrimination in the community and its lingering impact; past discrimination against black persons in education; evidence of historic unresponsiveness and insensitivity to the needs of the black community; discrimination in paving the roads in the black community; discrimination in the establishment of a segregated private school in the area; the depressed socio-economic status of black persons in the county vis-a-vis white persons. 458 U.S. 620-21. "Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination. . ." Id.

prima facie case"; Alexander v. Louisiana, 405 U.S. 625 at 632 (1972): ". . . affirmations of good faith in making individual [juror] selections are insufficient to dispel a prima facie case of systematic exclusion. The result bespeaks discrimination whether or not it was a conscious decision on the party of any individual jury commissioner"; Whitus v. Georgia, 389 U.S. 545 at 551 (1967): "[w]hile the commissioners testified that no one was included or rejected on the jury list because of race or color this has been held insufficient to overcome the prima facie case".

The reason for this rule was first asserted by this Court in Norris v. Alabama, supra. In virtually all jury challenge cases the state's primary rebuttal has been the testimony of state officials involved that they did not intend to discriminate, as it was in Norris. This Court recognized in Norris, however, that it would place an almost impossible burden on the defendant to require him to disprove such testimony. The Court held that to allow such general assertions of non-discrimination to rebut a prima facie case would be to make the mandate for non-discrimination in jury selection "a vain and illusory requirement". 294 U.S. at 481. See also, Hernandez v. Texas, supra, 347 U.S. at 481-482.

Moreover, the courts have been sensitive to the difficulty that a trial judge would have in judging the disclaimers of discriminatory intent made by often well-respected and well-liked officials of the court. Such was the situation in Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966), a case out of the Middle District of Georgia. There, the clerk was well respected and well liked. The Fifth Circuit recognized that it placed on the defendant an impossible burden to require him to convince the trial court to ignore the protestations of non-discriminatory intent of such a well liked court employee.

If the evidence brought forth by the State, merely being the protestations of a non-discriminatory intent by the jury commissioners, is an insufficient rebuttal case, then what is a rebuttal case? Casteneda v. Partida, supra, 430 U.S. at 499, makes it clear that a satisfactory explanation of statistical disparities is a requirement of rebuttal. Alexander v. Louisiana, supra, 405 U.S. at 632, points out that a rebuttal case may be made when the government comes forward and shows that "permissible racially neutral selection criteria and procedures have produced" the discriminatory effect.

However, such evidence must be affirmative and positive. The state cannot rely on general suppositions, as it attempted to do in Turner v. Fouche, supra, that disparities resulted from there being an insufficient number of qualified black persons [or women]. Absent positive affirmative proof that neutral factors are resulting in disparities there is no rebuttal case.

Accordingly, if the state had come forward and shown through positive affirmative proof that the extreme disparities shown in the Davis' prima facie case could be explained because there were insufficient black persons and women in the community to satisfy the neutral standards required in selecting jury lists, then it may have presented a rebuttal case. Needless to say, the state did not come forward and offer such proof. In fact, it could not offer such proof.

Due to this underrepresentation of cognizable groups, and the prosecutor's use of a peremptory challenge to remove each and every black venireperson who qualified for the jury (T. 2nd Trial,Vol. 14 at 27), Curfew Davis, a black person convicted of killing a white person, was sentenced to death by an all-white jury.

II.

THE PETITIONER WARDEN PREVAILED
ON THE "SANDSTROM v. MONTANA" ISSUE
IN THE CIRCUIT COURT BELOW AND THEREFORE
CANNOT EXPECT DUPLICATOUS RELIEF
FROM THIS COURT ON THIS ISSUE.

The Petitioner warden prevailed in the court below on the "Sandstrom v. Montana" issue, but now seeks certiorari on this issue. In seeking a rewrite of this issue, the warden misunderstands the function of this Court in our judicial system.

CONCLUSION

Respondent Davis, for the reasons stated above, prays that the Warden's petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for the opposing party with a copy of the foregoing pleading by placing same in the United States Mail with adequate first-class postage attached thereon addressed to Ms. Susan V. Boleyn, Assistant Attorney General, State of Georgia, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 19th day of April, 1985.

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